

## inBrief



## Dubai Court of Cassation clarifies the application of Optional Arbitration Clauses

By Chatura Randeniya and Nazim Hashim | 2 November 2021

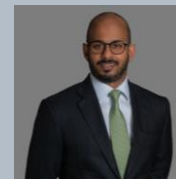
In a decision issued in July 2021, the Dubai Court of Appeal held that an arbitration clause should be construed narrowly, and emphasized that everything that may be waived or prevents its [i.e., the arbitration clause's] application must be sought. This judgment, which rejected a challenge to the jurisdiction of the Dubai Courts based on the existence of a purported arbitration agreement, was discussed in our [inBrief dated 12 September 2021](#). The gist of the judgment of the Court of Appeal was that the dispute resolution clause of the contract in question included language stating that any referral to arbitration will be 'without prejudice' to the jurisdiction of the UAE Courts and 'subject to agreement between the parties' and, following the principle of narrow construction of arbitration agreements, the Court of Appeal found that there was no evidence that an agreement was reached between the parties to resolve disputes through arbitration.

The judgment of the Dubai Court of Appeal was appealed to the Dubai Court of Cassation. The appellant took up the following arguments in appeal, among others:

- (a) there are multiple references to arbitration in the contract between the parties (in addition to the dispute resolution clause), which was evidence that the parties had agreed to resolve disputes through arbitration; and
- (b) there is evidence that the parties negotiated the applicable arbitration rules before entering into the contract, which is evidence that the parties had agreed to resolve disputes through arbitration.

In October 2021, the Court of Cassation affirmed the judgment of the Court of Appeal and rejected the appeal. In rejecting the argument summarized in (a) above, the Court of Cassation relied

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on the principle that arbitration agreements must be narrowly construed, which is now a common reference in judgments addressing the validity of an arbitration agreement. The Court of Cassation went further, and held that where there is an optional arbitration clause and one of the parties commences litigation, the other may not seek to rely on the arbitration agreement to challenge the jurisdiction of the courts. Unfortunately, the Court of Cassation did not elaborate further on this principle in this judgment, and is a missed opportunity for useful guidance on issues surrounding optional arbitration clauses. Would it have made a difference if it was a unilateral optional arbitration clause? What would have been the position if a party commences arbitration, as opposed to litigation, first?

In rejecting the argument summarized in (b) above, the Court of Cassation held that as the evidence relied on by the appellant was not produced in the lower courts, it is not admissible before the Court of Cassation, which is a court of law in the UAE.

This judgment highlights the need to have a carefully drafted dispute resolution clause, particularly where the parties wish to have disputes resolved through arbitration. ■

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